No. 06-132

In The
Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VAN DER WERF, MICHAEL AND JERILYN WARD,

Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The legislative history of the original enactment of the Maine statute in 1982 barring public funding of sectarian school tuition, 20-A Me. Rev. Stat. Ann. § 2951(2), is sparse. Two years prior to the enactment of section 2951(2), the Maine Attorney General opined that public funding of tuitions to sectarian schools would violate the Establishment Clause and noted that excessive entanglement was a significant factor. The legislative history does not indicate the extent to which Maine legislators relied on that opinion or whether they had additional reasons for enacting section 2951(2). The legislative history of the Legislature's consideration and rejection of a bill to repeal that provision in 2003 expressly sets forth a number of additional justifications to retain section 2951(2). The questions presented are:

1. Whether the Supreme Judicial Court of Maine properly considered the rationale of excessive entanglement when assessing a constitutional challenge to section 2951(2).

2. Whether petitioners have carried their burden of demonstrating that the only justification for the actions of the Maine Legislature was its understanding of the Establishment Clause.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Maine Department of Education and Commissioner Susan Gendron respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Supreme Judicial Court of Maine ("SJC"), issued on April 26, 2006, reproduced in the Appendix to the Petition for Writ of Certiorari ("App.") at 1-40, reported in *Anderson v. Town of Durham,* 895 A.2d 944 (Me. 2006).

STATEMENT OF THE CASE

There have now been two rounds of litigation and four decisions upholding Maine's unique secondary public education program which limits public funding of tuitions to nonreligious schools, 20-A Me. Rev. Stat. Ann. § 2951(2). In the first round, the United States Court of Appeals for the First Circuit and the SJC rejected Free Exercise Clause, Establishment Clause and Equal Protection challenges, and this Court denied petitions for writs of certiorari in both cases. *Bagley v. Raymond School Dist.*, 728 A.2d 127 (Me.), *cert. denied,* 528 U.S. 947 (1999); *Strout v. Albanese,* 178 F.3d 57 (1st Cir.), *cert. denied,* 528 U.S. 931 (1999). In the second round, both the First Circuit and the SJC again upheld section 2951(2) against First Amendment and Equal Protection challenges. *Eulitt v. State of Maine, Dep't of Education,* 386 F.3d 344 (1st Cir. 2004); *Anderson v. Town of Durham* (App. 1). Both appellate courts applied *Locke v. Davey*, 540 U.S. 712 (2004), in upholding the Maine statute in the second round. The plaintiffs in *Eulitt* chose not to file a petition for a writ of certiorari while those in *Anderson* now have filed.

1. Maine Public Education. Partly because of its relatively low population density and large number of local school administrative units, Maine's publicly funded education system has evolved into one distinct from those found elsewhere. The policy of the State is that "every person within the age limits prescribed by state statutes shall be provided an opportunity to receive the benefit of a free public education." 20-A Me. Rev. Stat. Ann. § 2(1); *see also* Me. Const., art. VIII, § 1. Although the so-called "Blaine Amendments" are named after a Mainer, our State declined to add one, or anything comparable, to the Maine Constitution. *See Bagley,* 728 A.2d at 132 n.8 (historical overview of Blaine Amendments). In the past, a few religious schools in Maine received direct public funding out of necessity,[1] and did so on a very limited basis until 1980.[2] Today, every Maine student has the opportunity to avail herself of the same type of publicly-funded education – a nonsectarian education, either at a publicly or

---

[1] Maine's tradition is one of civil, not ecclesiastic, education. From early statehood, Maine mostly had free public schools run by local officials, and, in fact, a constitutional provision to endow religious institutions was defeated by Maine's Constitutional Convention in 1819. Ernst C. Helmreich, *Religion and the Maine Schools; An Historical Approach*, at 8, 11-13 (1960). Certainly, where no public schools existed, religious ones filled the need, but as public education evolved in Maine, as it has nationally, secular education became the norm. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943) (noting that "[f]ree public education" is "faithful to the ideal of secular instruction").

[2] In 1979-80, Maine had over 70,000 high school students, and over 17,000 of those students were publicly tuitioned. (*Anderson v. Town of Durham*, Appendix to the Supreme Judicial Court of Maine ("SJC App.") 73, 143). Of the publicly tuitioned students, only 211 (or approximately 1.2 percent) attended religious secondary schools. *Id.* Of those 211 students, over half attended one school. *Id.; Bagley*, 728 A.2d at 138 n.19.

privately operated school. Petitioners seek to expand the program to include sectarian schools for a certain portion of the student population so that these students can receive a religious education at public expense.

Public education in Maine is funded by a combination of state and local dollars, and the State and local school administrative units provide public education in a variety of ways. 20-A Me. Rev. Stat. Ann. § 1001(8). A school administrative unit may build and operate its own high school. 20-A Me. Rev. Stat. Ann. §§ 15902, 15904 & 15905. Alternatively, a school administrative unit may contract with another school administrative unit or private school approved for tuition purposes, or pay tuition for students to obtain their public education at a public or private school that meets basic approval criteria for compulsory education purposes and is also approved for tuition purposes (hereafter "publicly tuitioned"). 20-A Me. Rev. Stat. Ann. §§ 2951, 5204(4). Under the latter two alternatives, the tuitions are paid by the school administrative unit directly to the public and private schools.

In 1979, a Maine legislator sought an opinion from the Attorney General whether Maine's statutes were constitutional insofar as they allowed students to attend religious schools with publicly-funded tuition. (App. 68). In January of 1980, the Attorney General issued an opinion that using public funds to pay tuition to sectarian schools would violate the Establishment Clause, and the existing Maine statutes should be read as not permitting such a practice, thereby avoiding any finding that Maine statutes were unconstitutional. Op. Me. Att'y Gen 80-2 (1980) (App. 68). The Attorney General noted, *inter alia,* that excessive entanglement was a significant factor. (App. 91). Facing the withdrawal of public funding, one religious school

(John Bapst) successfully transformed itself into a nonsectarian one. *Bagley,* 728 A.2d at 138 n.19; *Anderson v. Town of Durham,* Appendix to the Supreme Judicial Court of Maine ("SJC App.") 72-73.

In 1982, as part of a recodification of Maine's education laws, the Legislature enacted section 2951(2), as follows:

> A private school may be approved for the receipt of public funds for tuition purposes only if it:
>
> * * *
>
> 2. NONSECTARIAN. Is a nonsectarian school in accordance with the First Amendment of the United States Constitution. . . .

Me. Pub. L., 1981, c. 693, § 3.[3] The legislative history is relatively silent regarding the rationales of the Legislature, other than to note that the legislation "does not . . . contain any substantive changes whatsoever." 1 Me. Leg. Rec. 229 (1982). There is no legislative report or debate that establishes that the Legislature enacted section 2951(2) only to avoid Establishment Clause violations.

Petitioners argue that section 2951(2) is unconstitutional only insofar as it precludes use of public funds to pay for the religious secondary education of their children under the public tuition program. Petitioners appear to concede that Maine can constitutionally deny public

[3] Because Maine has a two-year legislative session, although passed in 1982 this statute is cited as a 1981 Public Law, thus resulting in references to it as both a 1981 and a 1982 law.

funding of religious education in the operation of public schools and in contracts with private ones.

Finally, Maine law accommodates religious education in several ways. Maine permits funding of transportation and secular textbooks for religious schools. 30-A Me. Rev. Stat. Ann. §§ 5724(5) & (6). Maine statutes also have an express exemption for sectarian schools from the dictates of Maine's Human Rights Act regarding employment. 5 Me. Rev. Stat. Ann. §§ 4553(4), 4573-A(2) ("a religious organization may require that all applicants and employees conform to the religious tenets of that organization."); *see also* 26 Me. Rev. Stat. Ann. § 1043(11)(F)(21)(a) (exemption from unemployment insurance responsibilities for churches and religious organizations).

2. Operative Facts. The facts in this case are largely stipulated. (SJC App. 70-106). The petitioners are parents of high school age children who reside in the Maine towns of Minot, Raymond, and Durham. The school administrative units within these towns do not operate public high schools, and two of them tuition some of their students at public and private schools. (*Id.* at 80-86). Petitioners agree that all of these towns provide opportunities for at least an adequate publicly tuitioned education at publicly operated or privately operated nonsectarian high schools. (*Id.* at 74, 82, 84, 86).

The petitioners have elected to send their children to pervasively religious private schools that do not qualify as nonsectarian schools for payment of public tuition. The petitioners' children attend or have attended St. Dominic Regional High School which is a Roman Catholic school, or Union Springs or Pine Tree Academies which are Seventh Day Adventist schools. (SJC App. 86-93). Attendance at a

sectarian school is not required by petitioners' religions, and attendance at a nonsectarian school is not prohibited by their religions. (*Id.* at 95). Neither the State nor the towns have prevented any of the petitioners' children from attending these sectarian schools. (*Id.*)

All three sectarian schools require identification of religious denomination on applications for admission. (SJC App. 87, 90, 92). Courses in the Roman Catholic or Seventh Day Adventist religion are required each semester at the respective schools, and a student cannot avoid religious teachings at these schools. (*Id.* at 86-94).

St. Dominic Regional High School's admissions policy gives preference to students whose families are registered members of Catholic parishes. (SJC App. 86-87). Catholicism is part of every class. (*Id.*) Applicants for teaching positions must mirror "gospel values" and understand the role of the school as a "unique pastoral, educational agency of the church," and must take Catholic religious education programs. (*Id.* at 88). Approximately 75 percent of St. Dominic's students are Catholic, and over 88 percent of the professional staff is Catholic. (*Id.*) All of Pine Tree's professional staff are Seventh-day Adventists, as are 75 to 85 percent of the high school students. (SJC App. 88).

The Commissioner of the Maine Department of Education has the responsibility to oversee Maine's public education system. 20-A Me. Rev. Stat. Ann. §§ 201(1), 254, 2954, 2902(7), 2951(5), & 4704. The Commissioner has the authority and obligation to investigate and disapprove of biased, intolerant or anti-American instruction in public schools and nonsectarian private schools that accept public funds. *Id.*; SJC App. 125-30. She has great difficulty envisioning how to do so with respect to religious schools.

Maine's anti-discrimination statutes are inapplicable to them, 5 Me. Rev. Stat. Ann. § 4573-A, and she does not, and believes she cannot, oversee or review the religious component of sectarian schools, no matter what they teach.[4] (SJC App. 125-30). Below, petitioners failed to rebut the Commissioner's testimony regarding oversight and entanglement difficulties that would occur if Maine were forced to fund religious education.

3. Procedural Background. As noted above, in 1999, both the SJC and the First Circuit rejected constitutional challenges to section 2951(2) virtually identical to those presented here. *Bagley v. Raymond School Dist.*, 728 A.2d 127 (Me.), *cert. denied,* 528 U.S. 947 (1999); *Strout v. Albanese,* 178 F.3d 57 (1st Cir.), *cert. denied,* 528 U.S. 931 (1999). Regarding the Equal Protection challenges, the State relied upon one rationale – that the state of the law was such that direct public funding of religious schools would violate the Establishment Clause. Both Courts found that rationale to be legitimate, and concluded there was no violation of Equal Protection. In passing, the SJC in *Bagley* in *dicta* noted a concern over excessive entanglement. *Bagley,* 728 A.2d at 146.

Three years later, the Supreme Court issued its decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Relying upon *Zelman*, proponents of public funding

[4] Some of the petitioners asserted that public money should fund sectarian schools no matter what they teach as part of their religion including anti-American and intolerant views, while others testified that the state should not fund religious schools where the religion supports abortion, witchcraft, anti-Catholic or anti-American religious tenets. (SJC App. 98-99, 100-101, 103).

of religious education went to the Maine Legislature as well as both federal and state courts.

(1) With the assistance of several petitioners and their present counsel, a bill to repeal section 2951(2) was brought before the Maine legislature in 2003. According to one of its primary sponsors, the bill "was collaborative of a number of parents as well as the Roman Catholic Diocese." (SJC App. 74, 112, 167-68). Both the Maine House and the Senate rejected the bill. (*Id.* at 75-76). In the debates, the justifications for the Legislature's refusal to fund tuitions at religious schools were identified, and included:

> The government has an important oversight role with respect to what is taught in schools but cannot, and should not, oversee the religious components of any school. Because of that, public funds should not pay for an education over which the state cannot have complete oversight.
>
> A publicly funded education system works best when that education is one of diversity and assimilation, and not a "separate and sectarian" one.
>
> Public funds should pay for a religiously neutral rather than a religious education.
>
> Religious schools can, and reserve the right to, discriminate in favor of those of their own religion, and this State should not fund discrimination.
>
> Maine's school system is not failing, and therefore *Zelman* does not apply.

(SJC App. 112-16, 169-78). No legislator – even those supporting the bill – suggested that the bill should be passed because the publicly funded options available to

high school students in such towns as Raymond, Durham or Minot were inadequate.

(2) The lawsuit filed in federal court made essentially the same arguments and sought the same relief as in the present matter. On October 22, 2004, the First Circuit decided that section 2951(2) did not violate the First Amendment or Equal Protection Clause, and that the holding in *Locke v. Davey*, 540 U.S. 712 (2004), applied to this controversy. *Eulitt v. State of Maine, Dep't of Education,* 386 F.3d 344 (1st Cir. 2004). The First Circuit read *Locke* as recognizing "that state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the *Establishment Clause* may not require them to do so." *Id.* at 355.

The appeals court found that section 2951(2) easily passes the tests identified in *Locke*, finding no animus towards religion. *Id.* With respect to the Equal Protection claim, the *Eulitt* court applied the rational basis test as prescribed by *Locke.* The appeals court relied upon rationales, including those specifically considered by the Legislature when it rejected the recent effort to change the law in 2003, which the plaintiffs there conceded sufficed. *Id.* at 356.

(3) In state court, the SJC agreed with *Eulitt* that *Locke* provided the test to determine the constitutionality of a state's decision *not* to fund religious education. (App. 17-22). As the First Circuit had, the SJC found that section 2951(2) did not exhibit animus towards religion because "None of the parties in this case has asserted that attendance at public or secular private schools is proscribed by their faith, or that they are being punished for

engaging in conduct mandated by their faith, or that the statute places any pressure on them to modify their beliefs." (App. 27). The SJC also explained that the Attorney General's opinion was not motivated by animus towards religion but rather it sought to ensure the conformance of Maine's education system with the Supreme Court precedent of the time as well as to avoid damage claims and attorneys fees under 42 U.S.C. § 1983. The Legislature was not motivated by animus towards religion to the extent it followed that advice. (App. 24). Therefore, the rational basis test applied to the Equal Protection claim. (App. 28-30).

The SJC appropriately reevaluated its prior analysis of the Equal Protection claims in light of *Zelman* and *Locke*. (App. 14-31). The SJC considered the petitioners' arguments that the only justification for the enactment of section 2951(2) was to avoid Establishment Clause violations, that Maine could not proffer any other rationale, and that such a rationale was no longer viable in light of *Zelman*. The SJC read *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), as foreclosing other rationales only where the "'asserted purpose *could not have been* a goal of the legislation.'" The SJC went on to find that "[t]he justifications for the statute asserted by the State now are not inconsistent with or contradictory to prior stated goals," and concluded that "[a]voiding excessive entanglement between religion and state, a component of compliance with the *Establishment Clause*, was an original justification for the statute, and is asserted by the State in this litigation." (App. 29).

The SJC explained that, normally, excessive entanglement analysis is conducted in the context of a state program that already provides aid to religious institutions,

but here "[b]ecause we operate in terms of conceivable justifications, we can evaluate the hypothetical situation." (App. 29). The Court concluded, first, that it is conceivable that, "even after *Zelman,* under some set of facts, funding tuition for sectarian schools would run afoul of the Establishment Clause on excessive entanglement grounds," and it is unclear whether any sectarian schools would even wish to accept the entanglements that might arise from state oversight. (App. 29-30). In addition, the SJC concluded that avoidance of the significant entanglement that could arise because "payment [of the tuition] subjects a school's educational and religious practices to state regulation" "provides a rational basis to maintain the funding limitation in section 2951(2)." (App. 30-31).

REASONS THE PETITION SHOULD BE DENIED

The two questions presented by the Petition focus exclusively on the narrow issue of what particular governmental objectives can be considered in assessing the constitutionality of this statute. The Petition for a Writ of Certiorari does not ask this Court to address whether Maine's public education statute, in actual operation, violates the Free Exercise, Establishment, or Equal Protection Clauses. The SJC's ruling on the fact-laden issues presented does not merit this Court's attention because, among other reasons, the premises underlying the two questions presented are entirely unfounded.

Petitioners' questions presented assume that concerns about excessive entanglement could not conceivably have been a goal of the Maine legislature when it enacted section 2951(2), and, conversely, that the provision was

"based solely on a misinterpretation of the Federal Establishment Clause." Petition, at i. Neither assumption is well-founded. There is no basis in the record to conclude that motivations other than avoidance of Establishment Clause violations "could not have been" before the Legislature in 1982 when it originally enacted section 2951(2). The SJC properly applied *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), because another motivation – excessive entanglement – was identified at that time and for that matter noted by the SJC in *Bagley* in the first round of litigation. Simply put, the record fully supports the SJC's finding that a motivation other than avoiding Establishment Clause violations was before the Legislature in 1982. With regard to the Equal Protection claim, both courts considered rationales other than the one pressed in the first round of litigation. In *Eulitt*, the plaintiffs correctly conceded these other rationales could be relied upon by the court, and, in *Anderson*, the petitioners failed to carry their burden that, at the very least, the entanglement justification "could not have been" considered by the Legislature.

Even had petitioners directly presented their First Amendment and Equal Protection claims to the Court, certiorari would not be warranted. Neither petitioners nor their supporting *amici* identify any conflict in the lower courts regarding the meaning or application of *Locke,* because there is none. The SJC's decision, moreover, is fully consistent with *Locke*. In a straightforward manner, the SJC in *Anderson*, just as the First Circuit in *Eulitt*, determined that Maine's law did not mandate civil or criminal sanctions, did not inhibit political activities, and did not force a choice between one's religion and a

government benefit, and further that the history of the law did not evince animus towards religion.

Further, Maine's education system is unique, and neither petitioners nor their supporting *amici* identify any other education system that would be impacted by the decision. The SJC's decision does not preclude a state from deciding to follow *Zelman* and directly fund religious education. This dispute does not bring into play a Blaine Amendment, or any other state constitutional provision prohibiting public funding of religious schools or institutions, as no such provision was ever adopted in Maine. Petitioners and their supporting *amici* simply disagree with the educational policy decision made twice by the Maine Legislature, both before and after *Zelman,* not to publicly fund religious secondary schools with tuitions. Finally, the lower courts' reliance upon excessive entanglement as a valid rationale for section 2951(2) under the Equal Protection Clause is correct and no case has held otherwise.

I. BOTH QUESTIONS PRESENTED ARE PREMISED ON THE INCORRECT ASSERTION THAT THE ONLY CONCEIVABLE MOTIVATION OF THE MAINE LEGISLATURE IN 1982 WAS TO SATISFY THE ESTABLISHMENT CLAUSE.

A. There Is No Basis in the Record to Conclude that the Only Possible Motivation of the Legislature in 1982 Was to Satisfy the Establishment Clause.

The petition here, as stated in its Questions Presented, is premised entirely upon the assertions that the SJC in its Equal Protection analysis relied upon grounds that "were not the actual goal of the legislators" and that

the sole basis of section 2951(2) was "a misinterpretation of the Federal Establishment Clause." Petition, at i. The record does not support those assertions. The actual legislative history of section 2951(2) is sparse at best. There is not a thing in the legislative record indicating that the Legislature in 1982 considered only the Establishment Clause. While the Establishment Clause concerns were the ones that most readily come to the fore, there is no way of knowing all of the motivations of the Legislature on such a bare record.

Moreover, the SJC in *Anderson* considered other concerns that were most definitely before the Legislature in 1982 (and in 2003 as well): entanglement arising from state regulation of a religious school and the instruction therein.[5] Avoiding excessive entanglement was identified as a problem by the Attorney General in his 1980 opinion (App. 91) which petitioners claim set in motion the enactment of section 2951(2), and, moreover, was recognized in *dicta* by the SJC in *Bagley*. 728 A.2d at 146-47. In sum, the record does not support petitioners' premise that the only basis of section 2951(2) was Establishment Clause concerns, and instead supports the SJC's conclusion that

[5] The SJC in *Bagley* did state that the only justification presented by the State in that litigation was compliance with the Establishment Clause. *Bagley*, 728 A.2d at 131, 138. There is no legal or logical bar to consideration of other rationales now. Maine has not taken "inconsistent positions" from those taken in *Strout* or *Bagley*, just additional ones, and, even if Maine did so judicial estoppel does not pose a bar. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 369 (1946) ("the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states"). Thus, Maine certainly may present in the second round of litigation rationales and arguments not proffered in the first.

avoiding excessive entanglement was an original justification of the statute (App. 29).[6]

B. The SJC Properly Applied *Wiesenfeld.*

Petitioners urge this Court to grant certiorari on the grounds that there is a division of authority on whether a court can consider rationales other than the one that actually motivated it. Petition, at 10-16. According to petitioners, the SJC's consideration of another motivation is in conflict with *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), as well as *Christian Science Reading Room v. City of San Francisco,* 784 F.2d 1010, 1013 *amended by* 792 F.2d 124 (9th Cir. 1986), *cert. denied,* 479 U.S. 1066 (1987), and *Delaware River Basin Comm'n v. Bucks Cty. Water & Sewer Auth.,* 641 F.2d 1087 (3d Cir. 1981). To the contrary, the SJC faithfully applied *Wiesenfeld* to the legislative record before it.

The basic legal principles are not in dispute. Under the rational basis test, a state "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Rather, the party attacking the statute has "the burden to 'negative every conceivable basis which might support it.'"

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[6] In addition, petitioners are incorrect in assuming that the "misinterpretation of the Establishment Clause" rationale is no longer viable. Presently, there is no program allowing public funds to pay for tuitions for religious education in Maine. As noted by the SJC, therefore, the courts must assess petitioners' claims in terms of *any* conceivable program that might present Establishment Clause problems. (App. 29-30). It cannot be disputed that "[i]t remains conceivable, even after *Zelman*, that under some set of facts, funding tuition for sectarian schools would run afoul of the *Establishment Clause* on excessive entanglement grounds." (*Id.*)

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993) (citations omitted). "[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Communications,* 508 U.S. at 315; *see also United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (where there is a plausible reason for the statute, it is "'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision'" (citation omitted)); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.") A court "'consider[s] purposes advanced by counsel for the [government] or suggested initially by [itself],' as long as '[it is] careful not to attribute to the [government] purposes which it cannot reasonably be understood to have entertained.'" *Christian Science Reading Room,* 784 F.2d at 1013 (citations omitted). As this Court recognized in *Wiesenfeld,* conceivable purposes, even those not mentioned by the legislature, may be considered except where the challenger "demonstrates that the asserted purpose could not have been a goal of the legislation." 420 U.S. at 648 n.16.

The SJC faithfully applied these precedents, and in particular *Wiesenfeld*:

> The parents argue that the State is barred from offering additional, hypothetical rationales for the statute because the actual rationale is known, citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). The Court stated in *Wiesenfeld* that a court "need not in equal protection cases accept

> at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose *could not have been* a goal of the legislation." *Id.* (emphasis added). This is a different proposition from stating that only the precise purposes articulated by members of the Legislature and recorded in the legislative record may be considered. Thus, we are not bound by the justification proffered by the State in support of the statute in *Bagley,* or offered in support of the legislation in 1981. The justifications for the statute asserted by the State now are not inconsistent with or contradictory to prior stated goals. Avoiding excessive entanglement between religion and state, a component of compliance with the Establishment Clause, was an original justification for the statute, and is asserted by the State in this litigation.

(App. 29). The SJC's conclusion that the Maine Legislature conceivably enacted section 2951(2) based on concerns of excessive entanglement is fully consistent with the legislative record. As discussed earlier, there is no persuasive evidence that the Legislature enacted section 2951(2) *only* because it wanted to avoid violating the Constitution. Simply put, petitioners failed to prove that under no circumstances could the Legislature in 1982 have conceived of entanglement (or for that matter the other concerns more explicitly identified by the Legislature in 2003).[7] Indeed, petitioners cannot possibly carry their

[7] As described above, during the debates in 2003 when the Legislature voted not to repeal section 2951(2), a number of rationales were specifically discussed, including some that were not identified earlier. The First Circuit took cognizance of those other articulated rationales when it upheld the statute, *Eulitt*, 386 F.3d at 356, while the

(Continued on following page)

burden because entanglement concerns in particular were explicitly identified in the 1980 Attorney General's opinion.

Finally, we note that the record here is in stark contrast with that in *Wiesenfeld.* In that case, the Court had before it a 1939 House Report, a 1938 Final Report of the Advisory Council on Social Security, and 1939 Congressional hearings, as well as 1971 Advisory Council Reports, all directly and specifically identifying the sole justification for the challenged disparate treatment of husbands and wives in the Social Security Act. *Wiesenfeld,* 420 U.S. at 647, 649, 653. We have no similarly clear record that the Maine Legislature only considered the Establishment Clause rationale in 1982.[8]

SJC apparently did not find it necessary to go beyond those issues identified in the Attorney General's opinion. It is our position that these other reasons can be relied upon as well because there is no record indicating they *could not have been* considered by the Legislature in 1982, and because, in fact, they were considered in 2003. *See Bob Jones University v. United States*, 461 U.S. 574, 601 (1983) (Court considered legislative history regarding Congress' failure to act). Indeed, petitioners themselves rely upon the 2003 legislative record to support their arguments. Petition, at 14 n.14.

[8] Likewise, in *Christian Science Reading Room*, the appeals court had before it a detailed history of letters, eviction notices, and meetings which made clear that the only reason the airport evicted the religious organization was Establishment Clause concerns. 784 F.2d at 1010-12. The split decision in *Delaware River Basin Comm'n* affords petitioners no help because the majority explained that the legislative history did not disclose the purposes of the regulation, and that the court could consider rationales *not* set forth in the legislative history. 641 F.2d at 1093-1100. The court, however, found that the justifications put forward by the trial court and counsel were not rationally related to the achievement of the regulation's goals. *Id.*

II. EVEN IF THE PETITION HAD ACTUALLY PRESENTED THE QUESTION WHETHER THE MAINE PUBLIC EDUCATION SYSTEM OPERATES IN VIOLATION OF THE FIRST AMENDMENT AND EQUAL PROTECTION CLAUSE, CERTIORARI WOULD NOT BE WARRANTED.

A. There Is No Post-*Locke* Split in the Lower Courts.

Neither petitioners nor *amici* have identified any conflict within the lower courts regarding the application or meaning of *Locke* on the issues of whether a state's decision not to fund religious education violates the Free Exercise, Establishment or Equal Protection Clauses. As noted, both the First Circuit and SJC fully agree and independently found (1) that *Locke* applies to the issue of whether a state must fund religious secondary education, (2) that no animus towards religion has been established in Maine, and (3) that the policy decision of the Maine Legislature is supported by constitutional rationales. The only other pertinent case fully agreed with the First Circuit and the SJC that *Locke* applies to school funding issues regarding secondary schools, and applied *Locke* in the same manner. *Bush v. Holmes,* 886 So.2d 340, 362-66 (Fla. 1st Dist. Ct. App. 2004) (*en banc*) (Florida Constitution's prohibition on aid to religious schools does not violate the Free Exercise Clause), *aff'd on other grounds,* 919 So.2d 392 (Fla. 2006).

Petitioners' reliance on *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144 (3d Cir. 2002), *cert. denied,* 539 U.S. 942 (2003), is misplaced for at least two reasons. First, *Tenafly* preceded *Locke,* and, second, it does not involve school funding. The case dealt with the application of a zoning ordinance to a temporary religious

structure, not school funding. The Texas *amici* brief cites to two lower court cases. Those decisions, too, preceded *Locke*. *Peter v. Wedl,* 155 F.3d 992 (8th Cir. 1998); *Hartmann v. Stone,* 68 F.3d 973 (6th Cir. 1995). The "much needed guidance" to resolve the perceived conflict of these decisions with those in *Bagley* and *Strout* was noted in *Columbia Union College v. Clark,* 527 U.S. 1013, 1015 (1999) (Thomas, J., dissenting from denial of certiorari), but that "guidance" has now been provided in *Zelman* and *Locke*. There is no conflict in the lower courts post-*Locke* regarding the balance established by these two cases, and therefore certiorari should be denied.[9]

B. The SJC's Decision is Fully Consistent with *Locke*.

The arguments of petitioners and *amici* that a state legislature must fund religious education whenever it uses private schools to provide the type of education afforded in a publicly-operated school finds no support in this Court's decisions. This Court has never ordered a state legislature to so fund religious education.

The real aim here is to reargue *Locke*. Petitioners and *amici* suggest that a school funding decision not to fund religious education is presumptively unconstitutional

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[9] Petitioners persist in pressing the Establishment Clause public forum line of cases. Petition, at 20-21. As this Court noted in *Locke,* 540 U.S. at 721 n.3, that line of cases has nothing to do with school funding issues. Moreover, in none of those cases was the Court presented with rationales other than an asserted misapplication of the Establishment Clause. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent,* 454 U.S. 263 (1981).

because it is not religiously neutral, and that *Locke* did not resolve that issue. Petition, at 24-25; *Amici* Brief of Texas and Alabama, at 2-3, 8-19; *Amicus* Brief of Florida Governor, at 11-27. *Locke*, however, specifically did so. Petitioner there "contend[ed] that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* [508 U.S. 520 (1993)], the program is presumptively unconstitutional because it is not facially neutral with respect to religion. We reject his claim of presumptive unconstitutionality." *Locke*, 540 U.S. at 720 (footnote omitted). The Court then set forth the criteria and analytical framework to determine if animus existed where a state chose not to fund religious education.

Although petitioners and *amici* assert that *Locke's* reasoning is limited to post-secondary educational training of clergy, Petition, at 20-24, *Amici* Brief of Texas, at 2-3, there is nothing in that decision even hinting that the underlying analysis is so bounded. Indeed, a dissenter specifically recognized that the decision applied broadly. *Locke*, 540 U.S. at 734 (Scalia, J., dissenting) ("Today's holding is limited to training the clergy, but its logic is readily extendible.") The Court set forth the applicable test for a state decision not to fund religious education, and then applied it to the facts and circumstances of that case, which happened to deal with scholarships and a degree in devotional theology. In support of its reasoning, the majority relied upon cases involving elementary and post-secondary school funding. *Locke,* 540 U.S. at 718-19. Thus, it is clear that the balance, or "play in the joints,"

established by *Zelman* and *Locke* applies to all levels of education.[10]

Regarding the application of *Locke* to determine whether animus exists here, petitioners do not even argue that there is a problem with respect to the SJC's application of the three factors identified by the Court to analyze that issue. (App. 27). In particular, here, as in *Locke,* there are no sanctions against petitioners based upon their religion; rather, petitioners simply have chosen not to avail themselves of the government benefit of a publicly funded nonreligous education. The petitioners attempt to take the SJC to task for its review of the history of section 2951(2), and suggests that history evinces sufficient animus to warrant a conclusion that their Free Exercise rights have been violated. As succinctly, and correctly, found by the SJC:

> The fact that after *Zelman* the Legislature could hypothetically extend tuition funding to sectarian schools without violating the Establishment Clause does not support a presumption that religious hostility motivates the decision to continue

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[10] Petitioners also suggest that the Court should grant certiorari in the matter because *Locke* can be distinguished due to the difference in the amount of money provided in the Washington scholarship system as compared to that in the Maine tuition program. Petition, at 29. The Court did not mention the amount of money as being significant and, indeed, noted that the student could use the scholarship to "pursue a secular degree" and use his own money to obtain a religious one. *Locke*, 540 U.S. at 721 n.4. Whether the Washington scholarship funded a complete or partial education was irrelevant to the Court's analysis. Here, similarly, petitioners can avail themselves of a publicly funded nonsectarian secondary school education for their children just like all other Maine students, and use their own money to obtain a religious one.

> the religious school exclusion. *Locke* recognizes that states have some leeway to choose not to fund religious education even if a choice to fund religious education indirectly might not violate the Establishment Clause.

(App. 27-28). Petitioners' historical argument is that the Legislature passed section 2951(2) because the Attorney General and the Legislature itself made a mistake by misreading the then-applicable precedent. No religious animus arises from such a "mistake," and petitioners point to nothing in the Attorney General's opinion or the legislative record indicating otherwise.

Petitioners' arguments regarding anti-Catholic prejudice in the mid-19th century are irrelevant and internally inconsistent,[11] and petitioners have pointed to no record or evidence of such animus in 1982 or in 2003. For that matter, no Blaine Amendment passed in Maine even in the

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[11] Petitioners' arguments on this point are confusing and contradictory. Petition, at 2-3, 24-27. Petitioners seek to distinguish *Locke* because, they argue, there the Washington provision had existed as part of a long tradition not to fund religious education while Maine had a long tradition of funding religious education until 25 years ago. Apparently, according to petitioners, the lack of a "long tradition" of *not* funding religious education somehow prevents Maine from ever changing its policy. However, there is nothing in *Locke* or *Zelman* that suggests newer actions regarding funding of religious education are somehow more suspect because they were made in the 20th or 21st century, rather than in the 19th. Each action, whether it be to fund or not to fund religious education, is evaluated based on its own merits whenever it occurs, under *Zelman* and *Locke*, respectively.

At the same time, however, petitioners suggest that Maine has a long tradition of discriminating against Catholics in particular, in support of petitioners' claim of animus in Maine. If Maine funded Catholic schools until 25 years ago, it is hard to see what kind of anti-Catholic animus existed in Maine. Petitioners' incongruous use of the facts here highlights why certiorari is inappropriate.

19th century. Moreover, petitioners' asserted history of religious prejudice has not foreclosed the use of public funds for textbooks and busing at sectarian schools today,[12] nor prevented the Legislature from providing exemptions for such schools from a number of otherwise applicable statutes, including ones dealing with unemployment insurance and discrimination. In the end, petitioners point to no facts supporting the conclusion that animus against religion motivated the passage of section 2951(2) or that any such animus motivated the Legislature to retain it after *Zelman*.

Finally, the SJC's decision fully comports with the clear distinction this Court has drawn between interference with a protected right and state encouragement of an alternative activity. The government is accorded great discretion in funding decisions, even where it chooses not to fund an individual's exercise of fundamental rights. *Maher v. Doe,* 432 U.S. 464, 476-77 (1977) (woman's fundamental right to an abortion did not bring with it a fundamental right to have an abortion publicly funded, even when other family planning was publicly funded); *see also National Endowment of the Arts v. Finley*, 524 U.S. 569, 596 (1998) (denial of participation in a subsidy scheme does not as a general rule infringe on fundamental right of free speech); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upheld federal regulation prohibiting the use of Title X funds at clinics for abortion advocacy). Indeed, in *Locke*, the Court described the issue as "[t]he State has merely chosen not to fund a distinct category of instruction," 540

[12] Because the Court in *Locke* considered the "entirety" of the scholarship program, 540 U.S. at 724, so too it would be proper to consider the "entirety" of Maine's school funding program.

U.S. at 721, which is exactly what the Maine Legislature has done here.

C. The Maine Public Education System is Unique.

Maine's public educational system, as described above, is unique in how it utilizes public funds directly to pay for its children's public education. The funding occurs in several ways: publicly-operated schools, contracts with publicly-operated or private nonsectarian schools, and tuition payments to nonsectarian schools. The use of private nonsectarian schools, obviously, is intended to provide educational opportunities emulating that available in publicly-operated schools, which is generally perceived to be free "secular instruction." *See West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 637 (1943) ("Free public education, if faithful to the ideal of secular instruction . . . will not be partisan or enemy of any . . . creed.") In other words, all students in Maine, no matter where they live, can avail themselves of a publicly funded, nonsectarian education, by means of three funding schemes.

Neither petitioners nor *amici* refer to any similar state educational scheme, nor describe how *Anderson* prevents any state from choosing, if it believes the circumstances warrant, to fund religious education pursuant to the guidelines of *Zelman.* Moreover, and importantly, there is nothing constitutionally suspect about a system that seeks, in a variety of ways, to provide a "public school" education utilizing private schools that more closely resemble that type of nonsectarian education.

This statutory scheme is not founded upon a state Blaine Amendment, so this matter, like *Locke,* does not

bring that provision into play. *Locke,* 540 U.S. at 723 n.7. Moreover, in *Locke* the Court had before it a provision that prevented both direct and *indirect* funding, while in Maine *indirect* funding is permitted for textbooks and busing at religious schools. Therefore, neither a Blaine Amendment nor a statute banning all public support of sectarian schools is involved here. In Maine, while section 2951(2) does not presently allow for the direct use of public dollars for religious education, efforts to repeal that statute can be made, as several petitioners and their counsel attempted in 2003, without the bar of a Blaine Amendment. And, as noted, Maine's public education system does permit public funding of busing and nonreligious textbooks for sectarian schools. Petitioners do disservice to their cause by waving a 19th century flag of anti-Catholic prejudice at turn of the 21st century governmental actions.

D. The SJC's Reliance Upon Excessive Entanglement as a Rationale is Correct.

Petitioners claim that excessive entanglement as a matter of constitutional law cannot support a legislature's policy decision not to publicly tuition religious education.[13] Petition, at 16-20. The SJC found that:

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[13] Petitioners persist in characterizing their goal as *indirect* funding of religious schools. The public funds are paid directly from the school administrative unit to the school. The expenditure of public funds as requested by petitioners would be a *direct* payment to a sectarian school from governmental units to cover the *direct* cost to religiously educate the petitioners' children that petitioners themselves would otherwise have to pay. (SJC App. 95). That is how the petitioners themselves view it. (SJC App. 96, 98, 99, 104, 105). Petitioners want the State and towns to pay for their children's religious education and

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> [C]onflicts could result in significant entanglement of State education officials in religious matters if religious schools were to begin to receive public tuition funds and the State moves to enforce its various compliance requirements on the religious schools. This concern to avoid excessive entanglements provides a rational basis to maintain the funding limitation in section 2951(2).

(App. 30-31). *See also Eulitt,* 386 F.3d at 355.

It is perfectly rational for a court to consider such entanglement issues in the context of an Equal Protection challenge based upon asserted religious discrimination. Concerns over excessive entanglement are nothing novel in the religious funding setting. The Court has already recognized the constitutional significance of those considerations in the context of Establishment Clause challenges. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). There is no reason entanglement likewise cannot form a rational basis in the Equal Protection context. No case has held otherwise, and, in particular, petitioners identify no case conflicting with *Anderson* and *Eulitt* on this point.

The SJC's decision is fully consistent with those of the Court according substantial deference to a legislature's policy choices regarding education. *San Antonio Independent Sch. Dist. v. Rodriguez,* 411 U.S. 1, 42 (1973) ("Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.' The very complexity of the problems of financing and managing a statewide public school

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religious books. (App. 105). It is hard to imagine a more direct form of funding.

system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect.") (citations omitted)); *id.*, at 60 (upholding the Texas system because it "does not rest 'on grounds wholly irrelevant to the achievement of the State's objective.'") (Stewart, J., concurring). In this context, considerations of entanglement regarding, *inter alia,* admissions policies, hiring policies, financial audits, and oversight of instruction of a religious institution are certainly issues upon which a Legislature may base its decisions.

Finally, petitioners argue that the SJC's decision conflicts with *Witters v. Washington Dep't of Servs. for the Blind,* 474 U.S. 481 (1986) and *Zelman* regarding the SJC's use of excessive entanglement in the context of the Equal Protection challenge. Petition, at 12, 18. The Court in *Zelman* did not address the entanglement issue at all in any context as it was not raised, and in *Witters,* 474 U.S. at 489 n.5, the Court specifically "decline[d] to address the 'entanglement' issue" because the court below had not addressed it. Where *Witters* and *Zelman* did not deal with the issue, it is hard to see how there is a conflict.

CONCLUSION

For the reasons discussed above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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